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**GAO**

United States General Accounting Office  
**Office of General Counsel**

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August 1992

# **Digests of Decisions of the Comptroller General of the United States**

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Vol. III, No. 11

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# Preface

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This publication is one in a series of monthly pamphlets entitled "Digests of Decisions of the Comptroller General of the United States" which have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General pursuant to 31 U.S. Code § 3529 (formerly 31 U.S.C. §§ 74 and 82d). Decisions concerning claims are issued in accordance with 31 U.S. Code § 3702 (formerly 31 U.S.C. § 71). Decisions on the validity of contract awards are rendered pursuant to the Competition in Contracting Act, Pub. L. 98-369, July 18, 1984. Decisions in this pamphlet are presented in digest form. When requesting individual copies of these decisions, which are available in full text, cite them by the file number and date, e.g., B-229329.2, Sept. 29, 1989. Approximately 10 percent of GAO's decisions are published in full text as the Decisions of the Comptroller General of the United States. Copies of these decisions are available in individual copies, in monthly pamphlets and in annual volumes. Decisions in these volumes should be cited by volume, page number and year issued, e.g., 68 Comp. Gen. 644 (1989).

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# Appropriations/Financial Management

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**B-246702, August 6, 1992\*\*\***

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## Appropriations/Financial Management

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### Appropriation Availability

- Time availability
- ■ Fiscal-year appropriation
- ■ ■ Travel expenses

Section 10 of the Department of State Basic Authorities Act of 1956, ch. 841, 70 Stat. 890, 891 (1956) (codified at 22 U.S.C. § 2677 (1988)) authorizes the Department of State (Department) to use current year appropriations for all expenses of travel outside the continental United States when travel is ordered and begins in the current year, even though travel may not be completed in that fiscal year. We do not object to the Department's longstanding and reasonable determination that section 10 authorizes it to use current year appropriations for all expenses of temporary duty travel outside the continental United States, even when physical travel begins in the subsequent year, as long as the travel is ordered and a travel-related expense is incurred in the current year.

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**B-245856.7, August 11, 1992\*\*\***

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## Appropriations/Financial Management

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### Appropriation Availability

- Purpose availability
- ■ Fiscal-year appropriation
- ■ ■ Overobligation

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## Appropriations/Financial Management

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### Obligation

- Overobligation
- ■ Reports
- ■ ■ Closed accounts

Agencies generally are not authorized to pay overobligations of expired or closed accounts from current appropriations. 31 U.S.C. §§ 1341(a), 1502(a). Instead, overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations. However, until and unless Congress takes one of these actions, a deficiency exists in the account.

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## **Appropriations/Financial Management**

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### **Obligation**

#### **■ Overobligation**

#### **■ ■ Records**

#### **■ ■ ■ Criminal law matters**

Knowing and willful failure to record overobligations in an account or recording overobligations in an improper account in order to conceal a criminal violation of the Antideficiency Act is a criminal offense under provisions of Title 18, U.S.C.

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## **B-249372, August 13, 1992**

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## **Appropriations/Financial Management**

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### **Accountable Officers**

#### **■ Cashiers**

#### **■ ■ Relief**

#### **■ ■ ■ Physical losses**

#### **■ ■ ■ ■ Theft**

Due to civil unrest in Somalia, Agency for International Development mission transferred its imprest fund to offices of U.S. Embassy and locked funds in separate safe. Conditions deteriorated and embassy moved its funds but not AID funds because embassy personnel could not open AID safe. Embassy was closed, personnel were evacuated, and safe was looted. AID cashier acted with reasonable care to protect the funds under the circumstances, and is therefore relieved of liability for the loss under 31 U.S.C. § 3527(a).

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## **B-247857, August 25, 1992**

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## **Appropriations/Financial Management**

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### **Appropriation Availability**

#### **■ Purpose availability**

#### **■ ■ Specific purpose restrictions**

#### **■ ■ ■ Telephones**

National Mediation Board may use appropriated funds to install dedicated telephone lines in the residences of mediators. Although normally prohibited by 31 U.S.C. § 1348, when telephone service installation in a private residence is of restricted use or when there are numerous safeguards and the service is deemed essential, we have held the prohibition to be inapplicable. The Board has demonstrated the essential nature of the computer data transmission service and will prevent private misuse by installing dedicated telephone lines.

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# Civilian Personnel

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**B-240091.2, August 6, 1992**

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## Civilian Personnel

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### Travel

- Travel expenses
- ■ Vouchers
- ■ ■ Fraud

New rules announced in 70 Comp. Gen. 463 (1991) concerning the collection of subsistence payments which were made based on fraudulent travel vouchers are to be given prospective application only. Therefore, in a case where the fraudulent payments were discovered and collection by the agency was made prior to the effective date of 70 Comp. Gen. 463, the new rules do not apply.

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**B-247084, August 6, 1992**

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## Civilian Personnel

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### Travel

- Temporary duty
- ■ Lodging
- ■ ■ Interruption
- ■ ■ ■ Annual leave

Employee on long-term temporary duty was denied per diem for days he took annual leave, based on 41 C.F.R. § 301-7.15(a) (1991). Employee had leased a furnished apartment and paid monthly rent in advance, with no credit or refund for days away. Under the special computation rules of 41 C.F.R. § 301-7.14(a)(2) (1991), the daily lodging cost is to be computed by dividing the total lodging cost for the month by the number of days the apartment was "actually occupied" for official business purposes. Therefore, days of annual leave are to be excluded in computing daily lodging cost. Employee's claim for additional lodging expenses is allowed and remanded to the agency for computation of the amount due.

---

## Civilian Personnel

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### Travel

- Temporary duty
- ■ Miscellaneous expenses
- ■ ■ Reimbursement
- ■ ■ ■ Renter's insurance

Employee on long-term temporary duty assignment purchased renter's insurance for protection of his personal property and seeks reimbursement for this expense. Under 41 C.F.R. § 301-1.3(b) (1991), reimbursable travel expenses are confined to those expenses essential to the transaction of official business. Also, under 41 C.F.R. § 301-9.1(e) (1991), the purchase of renter's insurance is not a miscellaneous expenditure necessarily incurred by the traveler in connection with the transaction of official business. Employee's claim for renter's insurance is denied.

---

**B-249433, August 6, 1992**

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**Civilian Personnel**

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**Travel**

- Travel expenses
- ■ Mileage
- ■ ■ Commercial carriers
- ■ ■ ■ Commercial licenses

Financial Officer is advised that there are no decisions, or federal statutory or regulatory authority pertaining to reimbursement for use of unlicensed taxis and that the agency's policy of reimbursing employees at a rate comparable to licensed taxis in the area appears reasonable. There is no authority to reimburse employees for use of unlicensed taxis at a mileage rate under 5 U.S.C. § 5704 (1988).

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**B-247983, August 7, 1992**

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**Civilian Personnel**

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**Compensation**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Where an agency's prompt notification of an overpayment of pay to an employee precludes him from relying on the accuracy of the payment to his detriment, waiver under 5 U.S.C. § 5584 is inappropriate since collection of the payment would not be against equity and good conscience despite the absence of fault on the part of the employee.

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**Civilian Personnel**

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**Compensation**

- Debt collection
- ■ Waiver
- ■ ■ Authority
- ■ ■ ■ Applicability

Section 8138, Pub. L. No. 102-172, Nov. 26, 1991, the 1992 Appropriations Act for the Department of Defense, which authorizes the Secretary of Defense to cancel the indebtedness, up to \$2,500 of any member or former member of the uniformed services, if the debt was incurred in connection with Operation Desert Shield/Storm, is independent of and separate from the Comptroller General's authority to grant waiver under 5 U.S.C. § 5584. Requests for cancellation of debts under section 8138 are for consideration by the Department of Defense.

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**B-249174, August 7, 1992**

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**Civilian Personnel**

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**Relocation**

- Details
  - ■ Permanent duty stations
  - ■ ■ Determination
- 

**Civilian Personnel**

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**Relocation**

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Determination

Upon a permanent change-of-station transfer, an employee moved into quarters that he had rented during an extended detail and that he had continued to rent after the detail in anticipation of the transfer. Based on these and other facts, the agency's determination that the quarters were permanent, rather than temporary, was correct and therefore the disallowance of the employee's claim for temporary quarters subsistence expenses is sustained.

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**B-247771, August 12, 1992**

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**Civilian Personnel**

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**Compensation**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Due to administrative error in relying on a superseded regulation of the Office of Worker's Compensation Programs (OWCP), the Forest Service erroneously kept an employee in a continuation-of-pay status, and thus overpaid him, when he should have been receiving compensation directly from OWCP. Since the erroneous payments of Forest Service compensation and the OWCP compensation are essentially duplicate payments, we do not believe that collection of the amount of money equivalent to the OWCP compensation would be against equity and good conscience. Waiver granted in part and denied in part.

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**B-246359, August 14, 1992\*\*\***

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**Civilian Personnel**

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**Leaves Of Absence**

- Military leave
- ■ Accrual
- ■ ■ Eligibility

Federal employees who are members of the Reserve or National Guard serving on active military duty which extends into a second or succeeding fiscal year may accrue and use the 15 days of military leave which accrue at the beginning of the second and each succeeding fiscal year without return to civilian status. 70 Comp. Gen. 263 (1991) amplified.

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**Civilian Personnel**

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**Leaves Of Absence**

- Military leave
- ■ Charging

When an employee who is a member of the Reserve or National Guard serves on an extended period of active duty that spans two or more fiscal years, such as Operation Desert Shield/Storm,

military leave need not be charged for intervening nonworkdays occurring between the beginning of the second or subsequent fiscal year and the date on which the employee begins to use military leave. Each fiscal year may be considered separately for charging periods of military leave under 5 U.S.C. § 6323(a). However, once use of military leave is begun, it must be charged on a calendar day basis including intervening nonworkdays.

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## **Civilian Personnel**

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### **Leaves Of Absence**

#### **■ Military leave**

#### **■ ■ Charging**

An agency may allow an employee to choose not to use military leave at all for workdays included in an absence due to military duty but rather to cover the workdays by taking annual leave, leave without pay, compensatory time off, or a combination of these. In such a situation, there need be no charge to military leave for the nonworkdays wholly within the absence.

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## **B-231927.4, August 20, 1992**

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## **Civilian Personnel**

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### **Compensation**

#### **■ Retroactive compensation**

#### **■ ■ Statutes of limitation**

Congresswoman is advised that substantive law in 10 U.S.C. § 1586(d), upon which authority we held that employee was entitled to backpay in *Yukio Fujikawa*, B-231927.3, Apr. 13, 1990, does not supersede statute of limitations provision in 31 U.S.C. § 3702(b)(1). Section 3702(b)(1) is not a mere statute of limitations but rather is a condition precedent to the right to have the claim considered by the General Accounting Office. The federal courts follow the same rule. We are without authority to waive or modify the application of this statute.

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## **B-246653.2, August 20, 1992**

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## **Civilian Personnel**

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### **Compensation**

#### **■ Overpayments**

#### **■ ■ Error detection**

#### **■ ■ ■ Debt collection**

#### **■ ■ ■ ■ Waiver**

Agency requests reconsideration of our decision, *Richard A. Young*, B-246653, May 8, 1992, denying waiver of an overpayment of salary to an employee who was erroneously paid the full 100 percent pay comparability increase (instead of 50 percent) for approximately 8 months. The agency plans to reverse its earlier position denying waiver and approve waiver of collection of the overpayment of \$756. In light of the agency's revised determination that the employee was not at fault in accepting the erroneous payments, the agency is advised that this Office has no objection to its granting of waiver of the overpayment of pay. See Pub. L. No. 102-190, title 6, § 657(a), Dec. 5, 1991, 105 Stat. 1393, and 4 C.F.R. § 91.4(c)(1) (1992).

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**B-247754, August 20, 1992**

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**Civilian Personnel**

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**Compensation**

- **Retroactive compensation**
- ■ **Eligibility**
- ■ ■ **Adverse personnel actions**
- ■ ■ ■ **Classification**

Employee's position was reclassified from grade GS-6 to grade GS-7 incident to agency position classification audit. Agency must promote qualified employee within a reasonable time or remove her from the position. Here agency delayed promoting employee to grade GS-7. Employee is entitled to retroactive promotion beginning with the fourth pay period after the date of the position reclassification.

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**B-247907, August 20, 1992\*\*\***

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**Civilian Personnel**

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**Travel**

- **Permanent duty stations**
- ■ **Actual subsistence expenses**
- ■ ■ **Prohibition**

An employee was assigned as a trainer/facilitator for a 5-day managerial seminar held at a hotel located within the corporate city limits of his permanent duty station and place of residence. Even though the demands of the seminar required the employee to remain at the hotel until late at night, he was not required to remain there overnight to provide necessary services incident to the training. Therefore, the employee is not entitled to reimbursement of overnight lodging expenses in view of the prohibition against payment of per diem or actual subsistence expenses within the limits of the city that constitutes the employee's official duty station.

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**B-248012, August 25, 1992**

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**Civilian Personnel**

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**Relocation**

- **Temporary quarters**
- ■ **Actual subsistence expenses**
- ■ ■ **Eligibility**
- ■ ■ ■ **Extension**

A transferred employee contracted to purchase a residence with settlement initially scheduled shortly after the close of his initial 60-day period of temporary quarters. When settlement was postponed an additional 30 days, the employee requested an extension of his temporary quarters period. His voucher claim for the extended period was disallowed. Under 41 C.F.R. § 302-5.2(a)(2), agency has broad discretion to grant an extension if events arise during the initial period to cause permanent quarters occupancy to be delayed beyond that period and if the events are beyond the employee's control. Since there were no such delaying events here, the disallowance is sustained. *Stephen P. Szarka, B-247426, June 4, 1992, and decisions cited.*

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# Military Personnel

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**B-244101, August 3, 1992\*\*\***

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## **Military Personnel**

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### **Pay**

- Survivor benefits
- ■ Benefit election
- ■ ■ Election time periods
- ■ ■ ■ Former spouses

Where final divorce decree stated that member's former spouse was to be designated beneficiary under Survivor Benefit Plan and both member and former spouse, under deemed election provisions, fail to take action to effect such election within 1-year period after divorce, subsequent attempted election is without effect. Also, court ordered election under 10 U.S.C. § 1450(f)(4) is without effect to extend or open new 1-year window for such election.

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**B-230378.5, August 6, 1992\*\*\***

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## **Military Personnel**

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### **Pay**

- Survivor benefits
- ■ Annuities
- ■ ■ Set-off
- ■ ■ ■ Social security

Where a widow elected to begin drawing reduced social security benefits at age 60, the reduction in her Survivor Benefit Plan (SBP) annuity required by statute at age 62 to offset her social security benefits was properly computed based on the social security benefits she would have been entitled to at age 62, rather than on the benefit level set at age 60. Because the widow would be entitled to receive 82.9 percent of her full entitlement had she elected to begin receiving social security benefits at age 62, the proper offset therefore reduced SBP payments to her by an amount equal to 82.9 percent of the portion of her social security entitlement attributable to her deceased husband's military earnings, rather than by an amount equal to 71.5 percent of that entitlement. Prior inconsistent decisions, 69 Comp. Gen. 203 (1990) and 65 Comp. Gen. 813 (1986), are overruled.

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**B-244912, August 21, 1992**

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## **Military Personnel**

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### **Pay**

- Variable housing allowances
- ■ Eligibility

A member occupied Bachelor Officer Quarters and paid a service charge for maintenance of the quarters. He was entitled to Basic Allowance for Quarters (BAQ) only due to payment of child support. A member receiving BAQ solely for payment of child support is not entitled to a Variable Housing Allowance.



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**B-248537, August 25, 1992**

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**Military Personnel**

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**Pay**

- Basic quarters allowances
  - ■ Rates
  - ■ ■ Determination
  - ■ ■ ■ Dependents
- 

**Military Personnel**

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**Pay**

- Overpayments
- ■ Error detection
- ■ ■ Debt collection
- ■ ■ ■ Waiver

Member of the Navy was assigned government quarters. His wife, from whom he was separating, remained in government quarters and remained his dependent. Member applied for and received Basic Allowance for Quarters and Variable Housing Allowance (BAQ/VHA) for this time period. Waiver may not be granted because the member should have known that he was not entitled to BAQ/VHA while his dependent resided in assigned government housing.

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# Miscellaneous Topics

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**B-247038.3, August 7, 1992**

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## Miscellaneous Topics

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### Environment/Energy/Natural Resources

#### ■ Environmental protection

#### ■ ■ Air quality

#### ■ ■ ■ Operating permit program

#### ■ ■ ■ ■ Rulemaking

Because Clean Air Act operating program permit regulations are not specifically required to be developed under section 307(d)(1), there exists a presumption that the rulemaking provisions do not apply. That presumption was not overcome since the Administrator made neither an express nor an implied determination, as he was authorized to do, that the rulemaking provisions of section 307(d) applied.

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**B-248544, August 14, 1992**

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## Miscellaneous Topics

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### Environment/Energy/Natural Resources

#### ■ Environmental protection

#### ■ ■ Air quality

#### ■ ■ ■ Allowances

#### ■ ■ ■ ■ Extension

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## Miscellaneous Topics

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### Environment/Energy/Natural Resources

#### ■ Environmental protection

#### ■ ■ Allowances

#### ■ ■ ■ Allocation

#### ■ ■ ■ ■ Methods

Opinion concerning legal basis for EPA's proposal to use a telephone queuing system to rank order applications for extensions from sulfur dioxide emissions limitations under acid rain provisions (section 404, 42 U.S.C. § 7651c) of the Clean Air Act concludes that (1) nothing in section 404 precludes EPA from conditionally ranking allowance awards; (2) EPA's use of a telephone queuing system is within its discretion; and (3) EPS's proposal meets the statutory criteria for receiving an extension under sections 404(d)(1) and (2).

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# Procurement

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**B-247403.2, August 3, 1992**

**92-2 CPD 65**

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## Procurement

### Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Administrative discretion

Exclusion of a proposal from the competitive range was reasonable where the record shows that the agency properly found the protester's proposal unacceptable under all three of the major evaluation factors and thus unacceptable overall.

---

## Procurement

### Competitive Negotiation

- Technical evaluation boards
- ■ Bias allegation
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that a member of the technical evaluation team was biased against the protester is denied where there is no credible evidence of bias on the part of the technical official and the record supports the agency's rejection of the protester's proposal as technically unacceptable.

---

## Procurement

### Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where a small business offeror was found unacceptable under the evaluation criteria in the solicitation, the matter is one of technical acceptability rather than responsibility, and there is no requirement for referral to the Small Business Administration under the certificate of competency program.

---

**B-248120, August 3, 1992**

**92-2 CPD 66**

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## Procurement

### Competitive Negotiation

- Competitive advantage
- ■ Non-prejudicial allegation

Protest that apparent low bidder had an unfair competitive advantage in preparing its bid as the result of special knowledge about the agency's requirements for grounds maintenance in base housing areas because it was the incumbent contractor for these areas under a housing maintenance contract is denied; the record discloses that the government accorded the proposed awardee

no special advantage and the protester submitted a lower bid for maintenance services in the areas in question.

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**B-248131, August 3, 1992**

**92-2 CPD 67**

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**Procurement**

**Competitive Negotiation**

■ **Discussion reopening**

■ ■ **Propriety**

Agency improperly reopened competition to request third round of best and final offers (BAFO) after award where record does not support agency's argument that telephone request for information from awardee after second BAFOs had been received was necessary to determine combination of primary and backup proposals that would result in the lowest cost to the government; since the information requested was not necessary for this purpose, the request did not constitute improper discussions that warranted reopening the competition after award to afford the other offeror an additional opportunity for discussions.

---

**Procurement**

**Competitive Negotiation**

■ **Discussion reopening**

■ ■ **Propriety**

Although reduction of total price in original awardee's second best and final offer (BAFO) without indication of line item(s) that were reduced rendered price ambiguous, original awardee's subsequent opportunity to specify line item price that was reduced did not constitute discussions that warranted reopening competition where its price already was low based on first BAFO and, aside from \$50,000 total price reduction, its second BAFO altered none of the terms of the first BAFO; since original awardee gained no competitive advantage from post-BAFO communication, and other offeror therefore was not prejudiced, there would be no benefit to the procurement system from reopening the competition after competitive positions were compromised by disclosure of original awardee's price.

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**B-248142, August 3, 1992**

**92-2 CPD 68**

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**Procurement**

**Competitive Negotiation**

■ **Alternate offers**

■ ■ **Rejection**

■ ■ ■ **Propriety**

Agency properly rejected an offer of an alternate product in a procurement to replace shipboard navigational instruments, where the dimensions of the alternate product are different from those of the brand name product and the difference precludes mounting the alternate item in the ship's pre-existing mounting studs for the instruments.

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**B-248234, August 3, 1992**

**92-2 CPD 69**

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**Procurement**

**Sealed Bidding**

■ **Hand-carried bids**

■ ■ **Late submission**

■ ■ ■ **Acceptance criteria**

Bids are properly rejected as late where the bidder's agent was the paramount cause of the late delivery by delivering the bid to the wrong office only 2 minutes before bid opening instead of the place designated in the solicitation for receipt of bids which was several miles distant.

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**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ GAO decisions
  - ■ ■ Reconsideration
- 

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**Procurement**

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**Bid Protests**

- GAO decisions
- ■ Recommendations
- ■ ■ Convenience termination
- ■ ■ ■ Withdrawal

Prior decision sustaining protest of an agency's cost realism evaluation is affirmed on reconsideration, where the agency admits that its cost realism evaluation was defective, as found in the prior decision. Nevertheless, the decision recommendation—to terminate the awardee's contract for the convenience of the government and make award to the protester—is modified to provide that the agency need not terminate the awardee's contract (and that consequently the protester is entitled to reimbursement of its proposal preparation costs), where, after consideration of all the circumstances surrounding the procurement, including the cost to the government, the impact of the recommendation on the user agency's mission, as well as the prejudice to the protester and competitive procurement system, it is found that contract termination would not be in the best interests of the government.

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**B-248177, August 5, 1992****92-2 CPD 74**

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**Procurement**

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**Noncompetitive Negotiation**

- Industrial mobilization bases
- ■ Contract awards
- ■ ■ Propriety

Agency properly may award contracts for its current fiscal year needs for chemical protective suits on a noncompetitive basis to the current, active mobilization base producers in order to maintain their production capabilities notwithstanding the existence of other planned producers that could also manufacture the suits.

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**B-242379.5, August 6, 1992****92-2 CPD 76**

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Pricing errors
- ■ ■ Correction
- ■ ■ ■ Propriety

Protester's contention that agency should have permitted correction of its proposal after submission of best and final offers (BAFO) is denied where the proposed fee in the BAFO, for the first time, exceeds the statutory limit on such fees, and nothing in the BAFO suggests that the fee was erroneously calculated.

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Discussion reopening**

##### **■ ■ Propriety**

Contention that contracting officer abused discretion by failing to reopen discussions and permit a second round of BAFOs is denied where the contracting officer reasonably concluded that there would be no great advantage to reopening discussions because there was no evidence that protester would have lowered its proposed costs and fees, and there had already been substantial delay in the procurement.

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**B-243544.4, August 6, 1992**

**92-2 CPD 77**

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

##### **■ ■ GAO decisions**

##### **■ ■ ■ Reconsideration**

Party seeking reversal or modification of prior decision must convincingly show that decision contains either error of fact or law or information not previously considered that warrants its reversal or modification, and General Accounting Office will not reconsider a prior decision based upon arguments and information that could and should have been presented during the initial consideration of the protest.

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**B-246734.2, August 6, 1992**

**92-2 CPD 75**

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

##### **■ ■ GAO decisions**

##### **■ ■ ■ Reconsideration**

Reconsideration request of denial of protest against a sole-source procurement for flight termination receivers is denied where request contains no statement of facts or legal grounds warranting reversal but merely restates arguments made by the protester and previously considered by the General Accounting Office.

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**B-246760.2, August 6, 1992**

**92-2 CPD 78**

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

##### **■ ■ GAO decisions**

##### **■ ■ ■ Reconsideration**

Bid Protest Regulations require party requesting reconsideration of prior decision to show that decision contains errors of fact or law or to present information not previously considered that warrants reversal or modification of decision; repetition of arguments made during consideration of the original protest and mere disagreement with decision do not meet this standard.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Price reasonableness
- ■ ■ ■ Administrative discretion

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**Procurement**

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**Socio-Economic Policies**

- Small business 8(a) subcontracting
- ■ Contract awards
- ■ ■ Administrative discretion

Agency reasonably determined that awardee's bid under competitive 8(a) set-aside represents a fair market price where, although the 8(a) bid is 16 to 17 percent higher than the estimate, that difference is within the 25 percent differential generally permitted under 33 U.S.C. § 624 (1988), and the bid is lower than the other 8(a) bids received by approximately the same amount by which it exceeds the estimate.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Protester whose bid was rejected as nonresponsive is an interested party to challenge award to only other bidder; if protest were sustained, the remedy would be termination of the awardee's contract and a resolicitation under which the protester could compete.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Contingent fees
- ■ ■ ■ Contractor agents

The General Accounting Office will review allegations concerning misrepresentations of contingent fee arrangements where the protester offers some evidence and not mere speculation that contracting officials should have been on notice before award that the prospective awardee misrepresented the existence of a contingent fee arrangement in its bid.

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**Procurement**

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**Contract Management**

- Contract administration
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ GAO review

Solicitation's broad requirement that the successful bidder's facility comply with the "Uniform Fire Code" is a condition of performance that an awardee must meet and does not constitute a definitive responsibility criterion; whether awardee actually complies with that provision is a matter of contract administration.

**Procurement**

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**Competitive Negotiation**

- **Technical transfusion/leveling**
- ■ **Allegation substantiation**
- ■ ■ **Evidence sufficiency**

Agency request to each offeror to furnish information omitted from proposals, prior to scoring proposals in initial evaluation, does not constitute technical leveling.

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**Procurement**

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**Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Downgrading**
- ■ ■ ■ **Propriety**

Solicitation caveat that low proposed rates may result in lowered technical and management scores does not require agency to downgrade offeror for proposing certain labor rates which were lower than those in agency's cost estimate.

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**Procurement**

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**Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Wage rates**

To evaluate proposals for services to be performed in the Washington, D.C. area, agency reasonably based independent government cost estimate of labor rates on federal general schedule for comparable positions.

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**Procurement**

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**Competitive Negotiation**

- **Offers**
- ■ **Evaluation**
- ■ ■ **Cost estimates**

In evaluating probable overall cost to government, agency reasonably applied flat percentage for subcontracting based on prior contract performance. Solicitation requirement for submission of separate cost proposals for sample tasks, which did not specify how such costs would be evaluated, did not obligate agency to use sample task information to modify probable overall cost evaluation.



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**Procurement**

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**Contract Management**

- Contract administration
  - ■ Convenience termination
  - ■ ■ Administrative determination
  - ■ ■ ■ GAO review
- 

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**Procurement**

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**Competitive Negotiation**

- Offers
  - ■ Evaluation
  - ■ ■ Quality control
- 

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**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Interpretation

Agency improperly concluded that solicitation prohibited a relative evaluation of offerors' quality assurance plans where, under the most reasonable interpretation, the solicitation provided that the plans would receive a relative evaluation. Nevertheless, the General Accounting Office will not object to the agency's action in terminating the protester's contract and making award to the low priced offeror since the evaluation does not show a meaningful distinction between the plans, and nothing in the record indicates that the protester would have submitted a different proposal had it been informed that quality assurance plans would have been evaluated on an "acceptable/unacceptable" basis.

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**Procurement**

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**Competitive Negotiation**

- Offers
  - ■ Competitive ranges
  - ■ ■ Exclusion
  - ■ ■ ■ Evaluation errors
- 

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Protest that agency improperly eliminated proposal from competitive range as technically unacceptable is denied where record shows that agency evaluators reasonably concluded that protester failed to exhibit an adequate technical understanding of the task environment and that proposal failed to explain how offered technical approaches would adequately address that environment, as required by the RFP.

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Responsiveness****■ ■ ■ Descriptive literature****■ ■ ■ ■ Absence**

Where an invitation for bids issued to replace electrical equipment destroyed by fire and explosion required the submission of descriptive literature to establish that equipment being offered was compatible with existing equipment and in conformance to the solicitation's specifications, a bid, which did not include the required descriptive literature, was properly rejected as nonresponsive.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Cost realism****■ ■ ■ Evaluation errors****■ ■ ■ ■ Allegation substantiation**

Protester's challenge to the evaluation of its cost proposal is denied where the agency reasonably upwardly adjusted the protester's proposed direct labor costs because the labor costs in the cost proposal bore no relationship to the cost of the personnel for whom the protester submitted resumes, despite the specific admonition in the request for proposals that the cost proposal should reflect the cost of personnel for whom resumes were submitted, and where the agency uniformly applied an escalation factor to the proposed labor costs for all offerors in the option years to account for possible cost increases over the life of the contract.

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**Procurement**

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**Competitive Negotiation****■ Best/final offers****■ ■ Rejection****■ ■ ■ Price reasonableness****■ ■ ■ ■ Risks**

Contention that agency improperly rejected protester's best and final offer (BAFO) overhead rate and instead used the rate initially proposed is denied where the protester provided no explanation for the change in its rate, and where the agency reasonably concluded that acceptance of the lower rate in the protester's BAFO was too risky.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Cost realism****■ ■ ■ Evaluation****■ ■ ■ ■ Administrative discretion**

Agency reasonably evaluated protester's cost proposal using a more recent actual general and administrative expense rate, rather than the proposed rate based on prior experience, where the agency learned that the protester's current rates were substantially higher than the past rates mentioned in its proposal submissions.

**Procurement****Sealed Bidding**

- Low bids
- ■ Error correction

**Procurement****Sealed Bidding**

- Low bids
- ■ Error correction
- ■ ■ Price adjustments
- ■ ■ ■ Propriety

Protest that agency improperly permitted low bidder to correct a mistake in its bid is denied where the agency reasonably concluded that the bidder presented clear and convincing evidence that it mistakenly included a \$60,000 subcontractor quotation in its bid as \$600.

**Procurement****Contract Management**

- Contract performance
- ■ GAO review

**Procurement****Contractor Qualification**

- State/local laws
- ■ Compliance

Protest challenging propriety of award under solicitation for ship repair services on the basis that the awardee did not, prior to award, demonstrate its compliance with a solicitation requirement that offerors meet state regulations in their performance of these services is dismissed since this requirement was not a precondition to award, but rather a contract performance requirement, which the General Accounting Office has no basis to review absent allegations of bad faith.

**Procurement****Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

**Procurement****Sealed Bidding**

- Invitations for bids
- ■ Terms
- ■ ■ Defects

Protester's contention that the structure of an invitation for bids (IFB) for dredging services was flawed because, among other things, the IFB required bidders to calculate their own production rate for their respective dredges, is untimely where the protester complained to the agency prior to submitting its bid but did not protest to General Accounting Office until it learned that it had not been selected for award.

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## **Procurement**

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### **Sealed Bidding**

#### **■ Bids**

#### **■ ■ Responsiveness**

#### **■ ■ ■ Determination criteria**

Protester's claim that awardee's bid should be rejected as nonresponsive is denied where all the terms of the price schedule and equipment schedule were completed; no conditions or limitations were placed on the awardee's commitment to perform the dredging work required by the solicitation; and the agency's concerns about the awardee's bid went to capacity to perform as promised, not whether the awardee was committed to perform.

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**B-245886.5, August 7, 1992**

**92-2 CPD 89**

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## **Procurement**

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### **Bid Protests**

#### **■ GAO procedures**

#### **■ ■ GAO decisions**

#### **■ ■ ■ Reconsideration**

Reconsideration request that seeks modification of remedy reached in prior decision sustaining protest is denied where reconsideration request merely repeats arguments made during protest and record does not otherwise show error of fact or law warranting reversal or modification of the decision.

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**B-247596.2, August 7, 1992**

**92-2 CPD 90**

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## **Procurement**

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### **Competitive Negotiation**

#### **■ Offers**

#### **■ ■ Evaluation**

#### **■ ■ ■ Cost estimates**

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## **Procurement**

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### **Special Procurement Methods/Categories**

#### **■ Service contracts**

#### **■ ■ Fixed-price contracts**

#### **■ ■ ■ Options**

#### **■ ■ ■ ■ Wage rates**

Agency did not act improperly by failing to conduct a cost analysis of cost and pricing data submitted with the awardee's proposal and thus not considering direct labor rates contained in the data that were allegedly below Service Contract Act (SCA) minimum rates, where a fixed-price contract was contemplated and the requirement for cost and pricing data was waived by the agency because of adequate price competition and nothing on the face of the proposal indicated that the awardee intended to violate the SCA.

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## **Procurement**

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### **Contract Types**

- **Fixed-price contracts**
  - ■ **Price reasonableness**
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## **Procurement**

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### **Socio-Economic Policies**

- **Labor standards**
- ■ **Service contracts**
- ■ ■ **Wage rates**
- ■ ■ ■ **Errors**

Where it appears that both the awardee and the protester made different assumptions as to the number of labor hours that would be required by the agency under a solicitation line item which required a fixed-price for services on a monthly basis, General Accounting Office will not interfere with the award because even if the protester is correct the relatively small difference in price would not impact the relative standing of the offers.

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**B-246041.2, August 10, 1992\*\*\***

**92-2 CPD 91**

## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Preparation costs**
- ■ ■ **Adequacy**

Protester is entitled to the costs of filing and pursuing its protest where the agency failed to promptly and adequately investigate protest allegation of awardee's "bait and switch" tactic for at least 7 weeks after protest was filed, and then failed to take corrective action for 2 more months after receiving additional information in support of allegations.

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**B-248389, August 10, 1992**

**92-2 CPD 92**

## **Procurement**

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### **Special Procurement Methods/Categories**

- **Federal supply schedule**
- ■ **Multiple/aggregate awards**
- ■ ■ **Mandatory use**
- ■ ■ ■ **GAO review**

Agency whose requirements must be satisfied through a mandatory multiple-award supply schedule properly issued a delivery order to a firm whose schedule contract included a product meeting agency's technical requirements.

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**B-249631, August 10, 1992**

**92-2 CPD 93**

## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Interested parties**
- ■ ■ **Direct interest standards**

Small business which is found nonresponsible by agency and subsequently fails to file application for certificate of competency with Small Business Administration is not an interested party to protest the responsiveness of another bidder, since the protester would be ineligible for award even if its protest were sustained.

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Amendments
- ■ ■ Propriety

Protest of agency decision to amend solicitation and request second round of best and final offers after identifying protester as apparent successful offeror is denied where agency action was necessary to correct solicitation defect.

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**Procurement**

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**Competitive Negotiation**

- Best/final offers
- ■ Propriety

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Auction prohibition

Second round of best and final offers (BAFO) does not constitute prohibited auction, notwithstanding disclosure of protester's standing as apparent successful offeror, where (1) prices were not disclosed and (2) second round of BAFOs was required in the process of correcting defective solicitation.

**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Shipment schedules

Protest that solicitation's delivery schedule improperly restricts competition for procurement of ships to firms that already have vessels meeting the solicitation requirements, excluding prospective offerors that wish to build new ships, is denied where agency demonstrates that it has an immediate need for the vessels, and delivery schedule is reasonably related to that need.

**Procurement**

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**Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Compliance

Protest that agency should have awarded contract to the protester after terminating previously awarded contract for convenience of the government, rather than opting to resolicit the requirements in the future, is denied where the protester's proposal is unacceptable because it fails to conform to the material terms of the solicitation.

**Procurement**

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**Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Authority

Protest that bid is nonresponsive because it was submitted with certificate of procurement integrity signed by only one joint venturer is dismissed where post-bid opening evidence establishes that signing party in fact had authority to bind firm.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Certification
- ■ ■ ■ Submission time periods

Protest that firm improperly dated certificate of procurement integrity 1 week prior to bid opening and is therefore not liable for prohibited conduct occurring after that date is without merit; submission of a properly executed certificate imposes a continuing obligation upon firm and certifying individual during conduct of entire procurement.

**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Propriety
- ■ ■ Real property
- ■ ■ ■ Condemnation

The General Services Administration did not act improperly in first seeking expressions of interest and offers for a building site and then instituting a condemnation proceeding to acquire protester's site, where the protester's site was selected by the agency but the protester and agency were unable to reach an agreement as to a price for the site.

**Procurement**

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**Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Compliance

Agency properly rejected low bid as nonresponsive where solicitation required that offeror perform 20 percent of work with its own forces and protester's bid stated that it intends to perform only 15 percent of the work.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Materiality

Amendments to an invitation for bids (IFB) are material where they provide the government's exact specifications for, among other things, the size and material of pipe to be used in the installation of a fire sprinkler system and the size of a site section to be fitted with the sprinkler system, which have a significant impact on the contractor's obligations under the IFB.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
- ■ Amendments
- ■ ■ Acknowledgment
- ■ ■ ■ Responsiveness

Agency properly rejected bid as nonresponsive where bidder failed to acknowledge material amendments because, absent such acknowledgment, the bidder is not obligated to furnish the solicited sprinkler system in accordance with the specifications in the amendments.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Timber sales
- ■ ■ Recess
- ■ ■ ■ Auction prohibition

Protest challenging resumption of timber sale auction after expiration of recess requested by protester, but before protester returned to auction room, is denied where protester was on notice of duration of recess and bore responsibility for any delay in returning to auction room.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Dismissal of a protest as untimely was proper where the protester's challenge to its exclusion from the competitive range was filed approximately 10 weeks after the Department of the Air Force rendered an adverse decision on an agency-level protest raising the issue, even though the protest to the General Accounting Office (GAO) was filed within 10 days of contract award, and the pro-



tester allegedly received erroneous advice about the timeliness requirements in GAO's Bid Protest Regulations.

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**B-245844.3, B-245844.4, August 13, 1992**

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**92-2 CPD 103**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where requesting party has not shown that prior decision contains either errors of fact or law or information not previously considered that warrant reversal or modification of the decision.

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Auction prohibition

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**Procurement**

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**Competitive Negotiation**

- Discussion reopening
- ■ Propriety
- ■ ■ Best/final offers
- ■ ■ ■ Corrective actions

Despite the fact that prices were revealed in prior decision and that reacted portions of the award-ee's proposal were released by agency in response to a Freedom of Information Act request, General Accounting Office declines to change its recommendation that another round of best and final offers be solicited since the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

Award of costs to successful protester is affirmed where General Accounting Office finds that award was made on the basis of a proposal which does not accurately reflect the availability of key personnel.

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**B-247440.5, B-247440.6, August 13, 1992**

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Personnel experience
- ■ ■ Contractor misrepresentation
- ■ ■ ■ Intent

Allegation that awardee's proposal contained a material misrepresentation provides no basis to sustain a protest, where any possible misrepresentation was immaterial and the agency did not rely on the statement at issue in evaluating the proposal.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Point ratings

Protest challenging the agency's method of calculating awardee's evaluation score is denied, where the method is reasonable, consistent with the technical evaluation guide, and was equally applied throughout the evaluation process.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Allegation substantiation

Protest allegation that the agency based its evaluation of the size of offerors' proposed work force on "secret" staffing numbers is denied, where the agency explicitly informed the protester during discussions of the number which formed the agency's baseline figure.

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## **Procurement**

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### **Competitive Negotiation**

- Offers
- ■ Evaluation errors
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest challenging the agency's technical evaluation is denied, where that evaluation was reasonable and consistent with the solicitation's evaluation criteria, and the protester simply disagrees with the agency's technical judgment.

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**B-248383, August 13, 1992**

**92-2 CPD 104**

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## **Procurement**

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### **Sealed Bidding**

- Bids
- ■ Responsiveness
- ■ ■ Descriptive literature
- ■ ■ ■ Ambiguous bids

Bid was properly rejected where it contained unsolicited literature that either qualified what the bidder was required to provide or reasonably created an ambiguity as to what was being offered in the bid.

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**B-249067.2, August 13, 1992**

**92-2 CPD 105**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

A protester is not entitled to the costs of filing and pursuing its protest where the agency took corrective action as a result of the protest within 10 days after it was filed; alleged delay in

agency-level processes occurring prior to the protest is not a basis for entitlement to costs under Bid Protest Regulations.

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**B-249505, August 13, 1992****92-2 CPD 106**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Offeror whose proposal was ranked fourth based on technical and cost factors is not an interested party to protest cancellation of solicitation since protester would not be in line for award even if the protest were sustained and reinstatement of the canceled solicitation were recommended.

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**B-248295, August 14, 1992****92-2 CPD 107**

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Protest challenging, as unduly restrictive of competition, a requirement in request for proposals for medical screening services that information be reported within 5 working days of the request is denied where the agency explains why the requirement is reasonably related to its minimum needs and the protester does not refute the agency's position.

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**B-248309, August 14, 1992****92-2 CPD 108**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Technical equality
- ■ ■ ■ Cost savings

Firm which submitted the highest-priced of three proposals reasonably found to be technically equal is not an interested party to protest an award since price properly was the determinative factor for award and protester would not be in line for award if the protest were sustained.

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**Procurement**

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**Specifications**

- **Ambiguity allegation**
- ■ **Specification interpretation**

Protest that solicitation specifications are unclear is denied where all specifications to which the protester objects reasonably describe the work to be performed, and the information provided is adequate to enable firms to compete intelligently on an equal basis.

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**Procurement**

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**Bid Protests**

- **GAO procedures**
- ■ **GAO decisions**
- ■ ■ **Reconsideration**

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**Procurement**

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**Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Good cause exemptions**
- ■ ■ ■ **Applicability**

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**Procurement**

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**Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Significant issue exemptions**
- ■ ■ ■ **Applicability**

Prior decision dismissing protest is affirmed where protest was untimely filed and no basis exists for considering protest under good cause or significant issue exceptions.

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**Procurement**

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**Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **10-day rule**
- ■ ■ ■ **Adverse agency actions**

Where protester was given specific reasons why its offered fuel storage tanks were considered unacceptable 22 working days before formal rejection of its offer for the same reasons, its protests filed after the formal notification were untimely; protests had to be filed not later than 10 working days after first notice of agency's adverse determination.

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**Procurement**

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**Sealed Bidding**

- Invitations for bids
  - ■ Cancellation
  - ■ ■ Justification
  - ■ ■ ■ Price reasonableness
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**Procurement**

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**Socio-Economic Policies**

- Small business set-asides
- ■ Cancellation
- ■ ■ Unrestricted resolicitation
- ■ ■ ■ Propriety

Agency properly found the prices of the only two competing small business firms unreasonably high, canceled the small business set-aside, and resolicited on an unrestricted basis where the small business bids exceeded the bid of a large business by 17 percent and 38 percent, respectively, and the Small Business Administration elected not to appeal the procuring agency's decision to withdraw the set-aside.

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**Procurement**

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**Contractor Qualification**

- Responsibility/responsiveness distinctions
- ■ Supply contracts
- ■ ■ Work sites

Protest challenging agency's rejection as nonresponsive of a bid submitted under a solicitation for drydocking repairs and alterations based on the agency's concern that the route the ship must travel to the facility listed as the protester's intended place of performance is not accessible is sustained. The protester's compliance with the accessibility requirement is related to the bidder's responsibility, not the responsiveness of the bid, and, as such, the bidder's capability to provide an accessible place of performance could have been determined at any time prior to award.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Justification

The competitive range exclusion of the protester's proposal for an automated surveillance vessel tracking system was reasonable where the agency reasonably determined, in light of the information available to it at the time of its determination, that the proposed system contained evaluated deficiencies that would require major revisions to the system in order for the proposal to be considered acceptable.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest against solicitation requirement that offerors provide a particular component and that the component be manufactured in the United States is untimely where protest is filed after the closing date for receipt of proposals.

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**Procurement**

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**Socio-Economic Policies**

- Preferred products/services
- ■ Domestic products
- ■ ■ Waiver
- ■ ■ ■ Administrative discretion

The General Accounting Office will not review an agency determination not to waive "Buy American" restriction since the statute and regulations setting forth the restriction vest discretion regarding such waivers within the head of the agency and the determination involves balancing the goals of the restriction and foreign policy considerations.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Interested parties
- ■ ■ Direct interest standards

Even though agency's evaluation of transportation costs under f.o.b. origin solicitation appears to have been unreasonable in some areas, protest of evaluation is denied where protester would not have been in line for award even assuming corrections most favorable to protester.

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**Procurement**

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**Payment/Discharge**

- Shipment costs
- ■ Rate schedules
- ■ ■ Applicability

In evaluating bidders' transportation costs under f.o.b. origin solicitation, agency reasonably applied separate shipment costs for first articles and production lot test items where agency's prior experience indicated that items were likely to be shipped separately.

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**Procurement**

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**Sealed Bidding**

- Bids
- ■ Evaluation
- ■ ■ Shipment costs

Where solicitation provided for designation of f.o.b. origin shipping point other than place of performance, agency properly evaluated awardee's transportation costs based on seaport designated in bid as shipping point instead of awardee's plant.

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protest that agency improperly failed to consider preservation of U.S. defense industrial base before making award to foreign firm is untimely filed after bid opening where protester was aware when the solicitation was issued that the only other qualified producer of items being purchased is a foreign firm, and solicitation did not restrict procurement or accord a preference to domestic firms.

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**B-246139.3, August 21, 1992**

**92-2 CPD 116**

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Amendments
- ■ ■ Evaluation criteria
- ■ ■ ■ Modification

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## **Procurement**

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### **Competitive Negotiation**

- Requests for proposals
- ■ Terms
- ■ ■ Risks

In response to a General Accounting Office decision that an award under the request for proposals (RFP) was improper because it was based on a performance risk, whose relative importance was not disclosed *vis-a-vis* the evaluation factors specifically identified and listed in the RFP, agency properly amended RFP to include an additional weighted evaluation factor for performance risk and reopened discussions to allow offerors to submit revised proposals.

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**B-248014.2, August 21, 1992**

**92-2 CPD 117**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Adverse agency actions

Protest raising same argument denied in A-76 appeal decision is untimely where filed with the General Accounting Office (GAO) more than 10 working days after protester received the appeals board's denial; once informed of initial adverse agency action, protester may not delay filing subsequent protest with the GAO while it continues to pursue the matter with the agency.

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**Procurement**

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**Contract Management**

- Contract administration
- ■ Options
- ■ ■ Use
- ■ ■ ■ GAO review

Protest that agency improperly failed to exercise a contract option is dismissed since it involves a matter of contract administration outside the scope of the bid protest function.

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**Procurement**

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**Contract Management**

- Contract modification
- ■ Cardinal change doctrine
- ■ ■ GAO review

Protest that agency improperly modified contracts by reassigning to those contracts work that would have been performed under protester's contract option, had it been exercised, is denied since the reassigned work resulted in no change in the purpose or nature of the contracts and the increased workload under those contracts was permitted by the terms of those contracts.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Personnel
- ■ ■ ■ Adequacy

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Agency properly evaluated proposed electronics technicians as satisfying solicitation technical qualifications requirements where the proposed employees' resumes evidenced the required skill levels, and the technical evaluation panel members had direct familiarity with performance by these individuals of the required skills while employed by the incumbent contractor.



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## **Procurement**

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### **Contractor Qualification**

- Responsibility
  - ■ Contracting officer findings
  - ■ ■ Affirmative determination
  - ■ ■ ■ GAO review
- 

## **Procurement**

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### **Contractor Qualification**

- Responsibility criteria
- ■ Performance capabilities

Solicitation requirement that contractor furnish necessary test equipment not otherwise provided by the contracting agency is a performance requirement, the ability to comply with which is encompassed by the contracting officer's affirmative determination of responsibility.

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**B-248478, August 21, 1992**

**92-2 CPD 120**

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## **Procurement**

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### **Special Procurement Methods/Categories**

- Architect/engineering services
- ■ Offers
- ■ ■ Evaluation criteria
- ■ ■ ■ Application

Protest that agency should have selected the protester, the third-ranked firm, as the most highly qualified firm with which to negotiate an architect-engineer contract is denied where the record shows that the agency reasonably evaluated the protester's qualifications in accordance with the stated evaluation criteria.

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**B-246587.2, August 24, 1992**

**92-2 CPD 121**

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## **Procurement**

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### **Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of decision denying protest of a purchase order for ablative coating kits is denied where requester has failed to show that the prior decision— which found that the agency properly concluded that the protester did not have an acceptable alternate product— contained any legal or factual errors.

**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation****■ ■ ■ Prices****■ ■ ■ ■ Auction prohibition**

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation****■ ■ ■ Transportation contracts****■ ■ ■ ■ Rates**

Solicitation for negotiated contract seeking ocean and intermodal rates for transporting cargo which designates a ceiling on rates based upon prices for comparable movements established in existing transportation agreement, above which offers will be rejected, does not constitute an impermissible auction technique, where solicitation uniformly informs all offerors of the agency's intent to reject offers that exceed the ceiling rates, and there is no evidence that the agency intends to divulge any competitor's prices or otherwise make public the offerors's relative standing in the competition.

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**Procurement**

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**Competitive Negotiation****■ Ambiguous offers****■ ■ Determination criteria**

Solicitation contemplating negotiated contract which designates a ceiling on rates for ocean and intermodal rates for transporting cargo based upon rates for comparable movements derived from existing multiple award transportation agreement is ambiguous, where (1) the agency recently accepted all rates in the existing agreement— including the highest rates in the agreement—as fair and reasonable and in compliance with all applicable laws and regulations, but solicitation does not inform offerors that agency intends to reject offers that contain rates that exceed the lowest rates in the existing agreement, and (2) the solicitation does not clearly indicate whether the agency intends to permit offerors to revise initial rates that exceed the designated ceilings; offerors thus could be led to prepare offers based upon different assumptions.

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**Procurement**

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**Competitive Negotiation****■ Ambiguous offers****■ ■ Determination criteria**

Solicitation which incorporates by reference specific terms and conditions of current agreement which expires on the effective date of contract proposed by solicitation is not ambiguous, where each term and condition is specifically identified in the solicitation and will remain in effect for the life of the proposed contract, independent from, and irrespective of, the status of the agreement.

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## **Procurement**

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### **Bid Protests**

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Apparent solicitation improprieties**

Allegation that solicitation's evaluation criterion is ambiguous and unreasonably provides for comparing offered rates for ocean and intermodal transportation of cargo with commercial service contracts will not be considered, where solicitation clearly advised offerors of that evaluation method and protester failed to raise the allegation prior to the time set for receipt of proposals.

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## **B-247876, August 24, 1992**

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## **Procurement**

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### **Payment/Discharge**

- **Shipment**
- ■ **Carrier liability**
- ■ ■ **Burden of proof**

A *prima facie* case of carrier liability for the loss of tools shipped in a member's "tool box" is established, even though the inventory does not indicate that the box contained tools, when the description "tool box" is used. Apart from the member's allegation that the tool box contained tools when shipped, the Joint Military Industry Tables of Weights indicates that for purposes of adjusting claims an item described as a "tool box" will be considered to contain contents unless there is a specific indication that it is empty.

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## **B-248373, B-248374, August 24, 1992**

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**92-2 CPD 123**

## **Procurement**

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### **Contract Qualification**

- **Responsibility/responsiveness distinctions**

Requirement in invitation for bids (IFB) for the submission with the bid of certified test data from an independent testing laboratory regarding performance and other technical requirements to be met by the contractor in the construction of audiometric examination suites must be viewed as relating to bidder responsibility, as opposed to bid responsiveness, where the IFB did not advise bidders that the requirement would be treated as a matter of bid responsiveness.

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## **B-248394, August 25, 1992**

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**92-2 CPD 124**

## **Procurement**

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### **Competitive Negotiation**

- **Contract awards**
- ■ **Errors**
- ■ ■ **Corrective actions**
- ■ ■ ■ **Administrative recommendations**

Agency acted in good faith in requiring a reevaluation of proposals after making award to the protester where the record shows that the agency may have applied technical evaluation standards not based upon the solicitation requirements during the evaluation process.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Administrative reports
- ■ ■ Comments timeliness

General Accounting Office dismisses protest for failure to file comments where response to agency report only raises new protest grounds, based on information contained in agency report, but neither refers to original protest issues or the report on those issues.

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**B-247457, August 26, 1992**

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**Procurement**

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**Payment/Discharge**

- Shipment
- ■ Damages
- ■ ■ Evidence sufficiency

Where agency easily could have discovered carrier's address despite the firm's failure to insert it on the form to which the agency was to refer in order to relay notice of damage to the shipment of a member's household goods, the agency improperly relied on the omission as the reason for not sending timely notice. As a result, the carrier is presumed not liable for the damage.

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**B-248549, B-248549.2, August 26, 1992**

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**Procurement**

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**Contractor Qualification**

- Responsibility criteria
- ■ Distinctions
- ■ ■ Performance specifications

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**Procurement**

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**Contractor Qualification**

- Responsibility/responsiveness distinctions

Although solicitation required certification of drydocking availability to be submitted with bid, certification concerns bidders' capability to perform the contract, and therefore is a matter of responsibility (not responsiveness) that need only be met prior to award; solicitation cannot convert matter of responsibility into one of responsiveness.

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**B-249386.3, August 26, 1992**

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration of prior dismissal is denied where protester does not show that prior decision contains errors of fact or law or information not previously considered that warrants reversal of our decision.

---

**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs

Request that the General Accounting Office declare the protester entitled to award of the costs of filing and pursuing the first of three separate protests filed in connection with one solicitation will not be considered where request was filed more than 10 days after the agency notified protester of corrective action taken following the filing of initial protest; request related to subsequent protests will be considered where filed within 10 days after the agency notified protester of corrective action taken in response to those protests.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

Protester is not entitled to award of the costs of filing and pursuing two protests in connection with one solicitation where agency promptly took corrective action by canceling solicitation within 1 week after protests were filed.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Administrative remedies

General Accounting Office Bid Protest Regulations do not provide for award of proposal preparation costs in cases where agency has taken corrective action.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ GAO review

An agency's requirement for the use of an air conditioner refrigerant with an ozone depletion potential of zero is unobjectionable, despite the fact that it may exclude the protester from the competition, since it is aimed at the legitimate purpose of preventing depletion of the earth's protective ozone layer.

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**Procurement**

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**Competitive Negotiation**

- Offers
- ■ Submission time periods
- ■ ■ Adequacy

Protest that amended closing date for receipt of proposals did not permit sufficient time for firms to submit offers is denied where the agency permitted more than the statutorily required 30 days, adequate competition was received, and there is no evidence that the agency deliberately attempted to exclude the protester from the procurement.

**Procurement**

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**Competitive Negotiation**

- Offers
  - ■ Evaluation
  - ■ ■ Personnel experience
- 

**Procurement**

---

**Competitive Negotiation**

- Offers
  - ■ Evaluation errors
  - ■ ■ Evaluation criteria
  - ■ ■ ■ Application
- 

**Procurement**

---

**Competitive Negotiation**

- Requests for proposals
- ■ Evaluation criteria
- ■ ■ Personnel experience

Where solicitation provided for evaluation of experience as a subfactor under three of four evaluation criteria, agency consideration of information obtained from other activities regarding the experience of the protester's proposed project manager was neither unreasonable nor inconsistent with the solicitation evaluation scheme.

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**Procurement**

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**Competitive Negotiation**

- Contract awards
- ■ Administrative discretion
- ■ ■ Cost/technical tradeoffs
- ■ ■ ■ Technical superiority

Award to a higher cost, higher rated offeror was reasonable and consistent with an evaluation scheme that emphasized technical excellence; even if use of "best value analysis," involving numerical scoring of both price and technical factors, instead of use of "most advantageous" analysis, may have accorded price greater importance in evaluation than identified in solicitation, protester, as low price offeror, benefitted rather than being harmed.

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**Procurement**

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**Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Protest challenging solicitation specifications for bird control netting as unduly restrictive of competition is denied where record demonstrates that specifications are reasonably related to agency's minimum needs.

**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ Information submission
  - ■ ■ Timeliness
- 

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Where protester filed a protest with General Accounting Office (GAO) challenging solicitation's security vault specification as unduly restrictive, and agency delayed procurement to take corrective action, second protest to GAO challenging further alleged improprieties in the same specification is dismissed since this impropriety was apparent at the time of the initial protest to GAO; although the second protest was filed prior to the revised time set for receipt of initial proposals, consideration of such piecemeal submissions is inconsistent with GAO's mandate under the Competition in Contracting Act of 1984 to resolve protests quickly with only minimal disruption to the procurement process.

**Procurement**

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**Bid Protests**

- GAO procedures
  - ■ GAO decisions
  - ■ ■ Reconsideration
- 

**Procurement**

---

**Bid Protests**

- GAO procedures
  - ■ GAO decisions
  - ■ ■ Reconsideration
- 

**Procurement**

---

**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ Effective dates
- ■ ■ ■ Facsimile

For purposes of establishing timeliness, a protest is filed when actually received by our Office. Protester relying on telefax equipment to file protest bears the risk of untimely receipt of protest by the General Accounting Office.

**Procurement**

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**Bid Protests**

- GAO authority

General Accounting Office is without jurisdiction to consider a protest of a procurement by the Federal Deposit Insurance Corporation (FDIC) because FDIC is defined by statute as a mixed-ownership corporation and is therefore not a federal agency for bid protest purposes.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule

Protest based on information allegedly acquired months after initial protest was filed is untimely, where, in addition to protester's failure to diligently pursue information revealing the additional protest contentions, which is alone sufficient to dismiss protest, protest was filed more than 10 working days after the date protester admits obtaining sufficient information to establish its basis of protest.

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**Procurement**

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**Bid Protests**

- GAO procedures
- ■ GAO decisions
- ■ ■ Reconsideration

Request for reconsideration is denied where requesting party fails to show legal or factual error or present information not previously considered that warrants reversal or modification of prior decision.

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**Procurement**

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**Contractor Qualification**

- Approved sources
- ■ Alternate sources
- ■ ■ Approval
- ■ ■ ■ Government delays

In a sealed bid procurement for tank track shoe pin assemblies, in which the solicitation required the pin assemblies to have been previously tested and approved for inclusion on the qualified products list prior to award, the agency reasonably decided not to further delay its procurement where the protester's pin assemblies were not qualified at the time of award, despite the agency's delay of more than 1 year in procuring the pin assemblies to provide the protester with an opportunity to get its product qualified and the agency needed the pin assemblies to continue its production line.



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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Evaluation errors****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Application**

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**Procurement**

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**Competitive Negotiation****■ Requests for proposals****■ ■ Amendments****■ ■ ■ Evaluation criteria****■ ■ ■ ■ Modification**

Where agency correctly determined that it had improperly evaluated proposals based on less stringent requirements than those identified in the solicitation, agency properly took corrective action of amending the solicitation to reflect its actual minimum requirements and reopening negotiations with all offerors.

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Evaluation****■ ■ ■ Tests****■ ■ ■ ■ Certification**

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**Procurement**

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**Sealed bidding****■ Bids****■ ■ Responsiveness****■ ■ ■ Determination criteria**

Where solicitation for water-driven blowers clearly required bidders to submit certified test data indicating that products had been tested under specified conditions and protester's test data indicated that these conditions had not been met, agency had a reasonable basis for rejecting protester's bid as nonresponsive.

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**Procurement**

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**Competitive Negotiation****■ Offers****■ ■ Competitive ranges****■ ■ ■ Exclusion****■ ■ ■ ■ Administrative discretion**

Contracting officer properly excluded proposal from competitive range on the basis of reasonable determination that the offeror had no reasonable chance of award because of numerous deficiencies in its technical proposal which were not readily susceptible to correction.

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**Procurement**

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**Sealed Bidding****■ Bids****■ ■ Modification****■ ■ ■ Submission methods****■ ■ ■ ■ Facsimile**

Where solicitation permits the submission of bid modifications by facsimile machine only "if authorized" and does not elsewhere provide authorization, agency properly rejected facsimile bid modifications, notwithstanding a contract specialist's oral advice that the agency would accept the facsimile modifications.

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**B-248501, August 31, 1992****92-2 CPD 143**

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**Procurement**

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**Noncompetitive Negotiation****■ Contract awards****■ ■ Sole sources****■ ■ ■ Justification****■ ■ ■ ■ Urgent needs**

Agency reasonably justified a sole-source award of satellite communication terminals for use in the former Soviet Union to a manufacturer, which had previously supplied such equipment, where (1) urgent and compelling circumstances, not caused by lack of advanced planning, required the immediate deployment of the terminals by the following week, and (2) only the terminals of the selected source had been certified for deployment into the former Soviet Union and only these terminals could assuredly meet the agency's training and operational needs.

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**B-248757, August 31, 1992**

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**Procurement**

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**Contractor Qualification****■ Responsibility****■ ■ Contracting officer findings****■ ■ ■ Affirmative determination****■ ■ ■ ■ GAO review**

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**Procurement**

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**Contractor Qualification****■ Responsibility****■ ■ Corporate entities****■ ■ ■ Affiliates****■ ■ ■ ■ Suspended/debarred contractors**

Allegation that the president of the low bidder is affiliated with a debarred corporation constitutes a protest of an affirmative determination of responsibility which our Office will not review in the absence of a showing of fraud or bad faith on the part of the contracting officer or a failure to apply definitive responsibility criteria. Previous Case 1983

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**B-210929, August 2, 1983**

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**Appropriations/Financial Management**

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**Budget Process**

**■ Funding**

**■ ■ Construction contracts**

**■ ■ ■ Nuclear power plants**

1971 Public Works Appropriations Act, Pub. L. No. 91-439, 84 Stat. 890, 899 (1970), when read in conjunction with contracting and expenditure authority in the Bonneville Project Act, 16 U.S.C. § 832a(f), Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839f(a), and Federal Columbia River Transmission Systems Act, 16 U.S.C. § 838i(b), authorizes Bonneville Power Administration (BPA) to make payments, either by net billing or by direct disbursement from BPA Fund, to Washington Public Power Supply System (WPPSS) to complete construction of WPPSS Project 2.

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**Appropriations/Financial Management**

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**Budget Process**

**■ Funding**

**■ ■ Construction contracts**

**■ ■ ■ Contract financing**

While direct construction payments by BPA represent departure from bond financing arrangement originally presented to Congress, departure does not materially undercut basis for congressional approval. Direct payments by BPA merely accomplish directly what Congress otherwise authorized BPA to do indirectly.



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